

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-110331,
		C-110332
Plaintiff-Appellee,	:	TRIAL NOS. B-0902376A
		B-0809371A
vs.	:	
JILL HULL,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	
	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

Following the death of 11-week old Rachel West from malnutrition and dehydration, defendant-appellant Jill Hull was indicted for felony murder proximately caused by felonious assault in violation of R.C. 2903.02, felony murder proximately caused by child endangering in violation of R.C. 2903.02, and involuntary manslaughter proximately caused by child endangering in violation of R.C. 2903.04. After a bench trial, Hull was acquitted of involuntary manslaughter, but convicted of both counts of felony murder. The trial court merged the felony murder counts for sentencing and imposed a prison term of 15 years to life. Hull now appeals, bringing forth four assignments of error

We consider the assignments of error out of order for purposes of this judgment entry.

In her third assignment of error, Hull contests the sufficiency of the evidence underlying her convictions for felony murder. When reviewing the sufficiency of the evidence, this court must view all probative evidence and reasonable inferences in the light most favorable to the prosecution to determine whether any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

When a child suffers serious physical harm as a result of her parent “knowingly” failing to act in accordance with his or her legal duty to the child, the failure to act may constitute the crime of felonious assault. *State v. Elliott*, 104 Ohio App.3d 812, 817-818, 663 N.E.2d 412 (10th Dist.1995). Hull argues that the state did not prove that she had known that the way she had been feeding Rachel was causing Rachel to become malnourished and dehydrated, which resulted in Rachel’s death. But the state presented evidence that Hull had failed to take Rachel to the doctor despite being aware of her visibly emaciated condition. Further, the medical records of Hull’s three other children, which were admitted into evidence, indicated that those children had been taken to the doctor for well-and sick-visits, giving rise to the permissible inference that Hull knew when to take a child to the doctor. We hold that there was sufficient evidence to support the conviction for felony murder caused by felonious assault.

With respect to the felony-murder conviction premised on child endangering in violation of R.C. 2919.22(B)(1), we hold that there was insufficient evidence to support that conviction. There was no overt act of physical abuse or act of commission by Hull against Rachel. *See State v. Kamal*, 12 Ohio St.3d 306, 308-

309, 466 N.E.2d 860 (1984) (affirmative acts of physical abuse are expressly covered under R.C. 2919.22[B][1]). Even if, as the state argues, the acts of feeding Rachel with a dirty bottle and feeding her water instead of formula constituted overt acts of abuse, these were not the acts that ultimately caused Rachel's death. Accordingly, we reverse Hull's conviction for felony murder premised on child endangering in violation of R.C. 2919.22(B)(1), appealed in the case numbered C-110331.

The third assignment of error is sustained in part and overruled in part.

In her first assignment of error, Hull maintains that the trial court committed structural error when the court rendered a guilty finding prior to allowing Hull's counsel to present closing argument. Although the judge withdrew her finding of guilty upon Hull's objection, and then allowed the parties to present closing arguments, Hull argues that the trial court had improperly shifted the burden of proof to the defense to prove why Hull was not guilty. We are unpersuaded.

The United States Supreme Court has held that "a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense." *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Here, the trial judge, after hearing extensive oral arguments on Hull's Crim.R. 29 motion for acquittal, stated that "the findings are guilty on all three counts at this time." While it was unfortunate that the trial judge determined guilt instead of finding that there was sufficient evidence to support the elements of each crime, this was not fatal to the case. The trial judge realized her mistake and corrected it. Further, following closing arguments, the trial judge stated that it had received a "lot of new insights" and "good case law" and had "much to think about." Two days later the court rendered the guilty findings. Based on the foregoing, we cannot say that the trial court committed structural error by totally

denying Hull the right to present closing argument. Hull was able to present closing argument, and the record demonstrated that the trial court properly considered that argument in light of the evidence presented. The first assignment of error is overruled.

In her second assignment of error, Hull contends that the trial court erred by denying her motion to dismiss the two felony murder counts. Hull argues that R.C. 1.51 required the state to charge her with involuntary manslaughter premised on a violation of child endangering in violation of R.C. 2919.22(A), a special criminal provision, instead of felony murder premised on felonious assault, a general provision. But R.C. 1.51 is only applicable where the crimes charged are allied offenses of similar import, and were not committed separately or with a separate animus. *State v. Chippendale*, 52 Ohio St.3d 118, 120-121, 556 N.E.2d 1134 (1994). Here, the involuntary-manslaughter charge and the felony-murder charge premised on felonious assault were not allied offenses of similar import because different conduct supported each charge. Accordingly, the second assignment of error is overruled.

In her fourth and final assignment of error, Hull argues that the convictions for felony murder were against the manifest weight of the evidence. Given our resolution of the third assignment of error, this assignment as to the felony-murder conviction based on child endangering is sustained. With respect to the remaining felony-murder conviction, we hold that the trial court did not lose its way and create a manifest miscarriage of justice by finding Hull guilty. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

In sum, we reverse the conviction for felony murder premised on child endangering in violation of R.C. 2919.22(B)(1) appealed under the case numbered C-

110331. Because the specific sentence of 15 years to life for the merged felony-murder counts was imposed only on the conviction appealed in the case numbered C-110331, which has now been reversed, we remand this case to the trial court to impose a sentence for felony murder based on felonious assault, the conviction appealed in the case numbered C-110332. In all other respects, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., HENDON and DINKELACKER, JJ.**

To the clerk:

Enter upon the journal of the court on June 27, 2012

per order of the court \_\_\_\_\_.  
Presiding Judge